(1)

90-730

Supreme Court, U.S.
FILED
NOV 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JERRY LADNER,

Petitioner,

v.

JOYCE ELIZABETH DANIELS JOHNSON
and CLAUDE WAYNE DANIELS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

GEORGE P. HEWES
(Counsel of Record)
BRUNINI, GRANTHAM, GROWER & HEWES
1400 Trustmark Building
Post Office Drawer 119
Jackson, Mississippi 39205
(601) 948-3101

Counsel for Petitioner

November 6, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

In this paternity action filed by a putative father who had a significant, enduring and developed relationship with his child, did the application of a six-year limitations statute deprive the father of his rights under the Due Process and Equal Protection Clauses of the United States Constitution?

PARTIES TO THE PROCEEDING BELOW

The names of the parties appear in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. ___

JERRY LADNER,

Petitioner,

v.

JOYCE ELIZABETH DANIELS JOHNSON
and CLAUDE WAYNE DANIELS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi is reported at 563 So. 2d 1368 (Miss. 1990). It is reprinted in Appendix A., App. 1a-5a, *infra.*

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on May 9, 1990. A petition for rehearing was denied on August 8, 1990. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

SECTION 2403(b) NOTIFICATION

Pursuant to Rule 29.4(c) of the Rules of the United States Supreme Court, Petitioner recites that 28 U.S.C. § 2403(b) may be applicable because the con-

stitutionality of the application of a Mississippi statute is drawn into question and the state of Mississippi is not a party.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Miss. Code Ann. § 15-1-49

All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

STATEMENT OF THE CASE

On October 15, 1985, Petitioner Jerry Wayne Ladner filed an action in the Chancery Court of Hancock County, Mississippi, seeking a declaration that he was the natural father of a child born on January 26, 1978, to Respondent Joyce Elizabeth Daniels Johnson. Petitioner also requested enforcement of his rights and obligations as the natural father of the child. Petitioner alleged he had supported the child since the child's birth and had exercised visitation rights until Respondent Johnson denied Petitioner access to

the child. Petitioner also stated he had acknowledged he was the natural father of the child. Petitioner requested that the child's birth certificate be revised to reflect he was the natural father and that support for the child be determined and imposed on Petitioner.

At the time of the child's birth, Respondent Johnson and Respondent Claude Wayne Daniels were married but separated.[1] The uncontradicted evidence in the record established that for more than a year before the child was born, Petitioner and Respondent Johnson lived together in Petitioner's home. They continued to live together for three years after the birth of the child. During the ten month period immediately prior to the birth of the child, Petitioner and Respondent Johnson had sexual intercourse at least three or four times a week.

During these years, Petitioner provided for the child and his mother. When the child's mother moved to her father's house, the child remained with Petitioner, except for one month when the child lived with his mother at her father's house. While the child lived with Petitioner, he supplied the child with the necessities of life and also enrolled him in school. Petitioner paid for the child's parochial education and provided daily transportation to and from school.

Petitioner and Respondent Johnson apparently had an informal and workable custody, visitation and support arrangement until a disagreement arose concerning Petitioner's desire to take the child out of

---

[1] A year after the child was born, Respondent Johnson sued Respondent Daniels for divorce, alleging he had deserted her and the minor child. The Chancery Court of Hancock County granted the divorce based on the ground of desertion.

state for a visit. Respondent Johnson then began denying Petitioner access to the child. Petitioner filed the complaint seeking a declaration of his paternity to protect his rights as parent of the child.

After the Respondents filed their Answer,[2] Petitioner moved to have Respondent Johnson, Respondent Daniels and the child submit to blood tests as allowed under Mississippi law. Petitioner also agreed to submit to a blood test. The Chancery Court granted Petitioner's motion, but the Respondents filed an interlocutory appeal to the Mississippi Supreme Court. There, the court vacated the Chancery Court's order because at the time the order was issued Mississippi law did not permit the plaintiff in a paternity action to move for blood tests. During the pendency of the appeal, however, the Mississippi Legislature passed a law permitting any party to move for blood tests. On remand, the Chancery Court granted Petitioner's motion a second time. *Johnson v. Ladner*, 514 So. 2d 327, 328-29 (Miss. 1987).

The blood tests for Petitioner, Respondent Johnson and the child were conducted by Dr. Robert E. Lewis, Director of the Paternity Testing Laboratory at the University of Mississippi Medical Center in Jackson, Mississippi. Dr. Lewis used the common HLA paternity test and found the probability of Petitioner's paternity to be 97.04%. In his report, Dr. Lewis concluded that "[p]aternity is very likely." Respondent Daniels never submitted to a blood test, despite being ordered to do so by the Chancery Court on four separate occasions. As a result, in a September 2, 1988,

---

[2] In their Answer, Respondents raised the statute of limitations as an affirmative defense.

order, the Chancery Court resolved the question of paternity in favor of Petitioner as permitted by Miss. Code Ann. § 93-9-21(1). App. 10a.

The Chancery Court ultimately entered its final judgment on March 2, 1989, declaring Petitioner to be the natural father of the minor child. App. 7a. The Chancery Court imposed support obligations on Petitioner and ordered visitation rights for Petitioner. In a prior order entered on June 24, 1988, the Chancery Court denied Respondents' motion to dismiss based on the statute of limitations defense. App. 13a.

Respondents appealed to the Mississippi Supreme Court and raised three issues. First, Respondents argued the trial court misapplied the Mississippi Uniform Law on Paternity to illegitimate a child. Second, they asserted the trial court erred by refusing to allow them, in opposing the blood tests, to submit evidence regarding the best interests of the child. Finally, Respondents contended Petitioner's paternity action was barred by one of two limitations statutes, either Miss. Code Ann. § 93-9-9 (1972) or *id.* § 15-1-49 (1972). The supreme court addressed only the statute of limitations issue. App. 3a.

At the time Petitioner filed his paternity action, § 93-9-9 provided:

> Paternity may be determined upon the petition of the mother, the child, or any public authority chargeable by law with the support of the child. If paternity has been lawfully determined, or has been acknowledged in writing according to the laws of this state, the liabilities of the father may be en-

> forced in the same or other proceeding by the mother, the child, or any public authority which has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, necessary support and maintenance, and medical or funeral expenses for the mother or the child. However, proceedings hereunder shall not be instituted by the mother after the child has reached the age of one year, unless the defendant be absent from the state so that personal service of process cannot be had upon him, or, unless the defendant has acknowledged in writing that he is the father of the child.[3]

In 1985, § 15-1-49 provided:

> All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.[4]

The supreme court concluded § 93-9-9 applied only to suits by the mother and in that situation the suit had to be filed within one year. The general catch-all statute of limitations, § 15-1-49, applied because no other limitations period under Mississippi law applied to a putative father's paternity action. App. 4a. The court also noted that a cause of action for paternity accrued with the birth of the minor child.

---

[3] This statute was amended in 1989 to establish an eighteen-year limitations period. *See* Miss. Code Ann. § 93-9-9 (Supp. 1990).

[4] In 1989, this section was amended to reduce the limitations period to three years. *See* Miss. Code Ann. § 15-1-49 (Supp. 1990).

Here, the child was born January 26, 1978, and Petitioner filed this paternity suit on October 15, 1985. Thus, the court held the suit barred by the statute of limitations. App. 5a.

Petitioner filed a petition for rehearing in the Mississippi Supreme Court and raised the Equal Protection and Due Process claims asserted in the instant petition. App. 16a.[5] On August 8, 1990, the Mississippi Supreme Court denied the petition for rehearing without comment. App. 6a.

REASON FOR GRANTING THE WRIT

The Result in this Case is Fundamentally Inconsistent with the Court's Pronouncements on the Degree of Protection Afforded Putative Fathers under the Due Process and Equal Protection Clauses of the United States Constitution.

This case presents the Court with an opportunity to delineate the constitutional rights of a putative father who seeks to establish paternity. To date, the Court has established the framework by which the rights of putative fathers are governed in other contexts. *See, e.g., Caban v. Mohammed*, 441 U.S. 380 (1979) (New York law allowing unwed mother to block adoption by withholding consent violates the Equal Protection clause where same right is denied unwed father); *Stanley v. Illinois*, 405 U.S. 645 (1972) (Illinois statute establishing presumption that unwed father is unfit parent held unconstitutional).

---

[5] By adequately raising the specific constitutional claims in his petition for rehearing, Petitioner has properly preserved these issues for review in this Court. *See, e.g., Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988); *Hathorn v. Lovorn*, 457 U.S. 255, 262-65 & nn. 12-15 (1982).

As the Court has noted, "[i]n the typical contested paternity proceeding, the [putative father's] nonadmission of paternity represents a disavowal of any interest in providing the training, nurture and loving protection that are at the heart of the parental relationship protected by the Constitution." *Rivera v. Minnich*, 483 U.S. 574, 580 (1987). This case, however, presents the converse of the "typical contested paternity proceeding." Petitioner has provided "the training, nurture and loving protection" on which the parent-child relationship is based and sought an adjudication of his paternity as well as the right to visit and support his child. Indeed, the context in which the instant petition appears reflects a re-awakening of the role of fathers in the lives of their children. As one author has observed:

> The legislatures, and indeed society, apparently never contemplated that a day would come when men themselves would seek to establish paternity, when a man would want to compel a woman into court to prove that he was the father of the woman's child. Today, after more than two decades of profound changes in social attitudes towards sex roles, which have included a new appreciation of men as parents and nurturers, that day has come.[6]

This Court has developed a two-part test to review an equal protection challenge to statutes of limitations applicable to paternity suits. Under this analysis, the Mississippi limitations period as applied in this case

---

[6] Note, 8 W. New Eng. L. Rev. 229, 230-31 (1986)

is unconstitutional. The Court initially announced this test in *Mills v. Habluetzel*, 456 U.S. 91 (1982):

> First, the period . . . must be sufficiently long in duration to present a reasonable opportunity for those with an interest in [illegitimate] children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims.

Id. at 99-100; *see also Clark v. Jeter*, 486 U.S. 456, 462 (1988). The primary objective of the limitations period is to allow an adequate opportunity for illegitimate children to obtain support. Mississippi's six-year limitations period is inadequate because six years is not a reasonable limitations period. By requiring that a paternity action be brought by a putative father within six years, the state ignores the likelihood that, as here, the father may actually be raising the child. The need to file a paternity suit, therefore, would not be present. Many unwed parents develop on their own "informal and in many cases workable custody, visitation and support" arrangements. *Karenina By Vronsky v. Presley*, 526 So. 2d 518, 520 (Miss. 1988). These arrangements are more likely to be made while the child is young and a short limitations period would defeat the purpose for which the limitations period exists.

Under the second part of the test, it is clear that, like the Pennsylvania six-year limitations statute in *Clark v. Jeter*, the Mississippi six-year limitations statute is not substantially related to Mississippi's interest in avoiding the litigation of stale or fraudulent claims.

Mississippi permits the issue of paternity to be litigated more than six years after the birth of an illegitimate child. For example, under § 93-9-9, as it existed at the time Petitioner filed this suit, if the putative father acknowledged his paternity in writing, a suit could be instituted more than one year after the child was born. In fact, there was no limitations period. There was also no limitations period for a paternity suit by a public agency charged by law with the support of the child.

In 1989, § 93-9-9 was amended to provide an eighteen-year statute of limitations for paternity suits brought under this section by the mother, the child, or a public agency. As explained in *Clark v. Jeter*, the amendment in 1989 by the Mississippi Legislature is a "tacit concession that proof problems are not overwhelming" in a paternity action. 486 U.S. at 465. In addition, under Mississippi intestate law, Miss. Code Ann. § 91-1-15(3)(b) (Supp. 1990), the issue of paternity could be litigated more than six years after the child's birth. Moreover, under § 15-1-59, most civil actions are tolled during the minority of the child.[7] Like the Pennsylvania statutes in *Mills*, these Mississippi statutes are inconsistent with the state's interest in avoiding the litigation of stale and fraudulent claims. In sum, Mississippi's policies cause one to doubt that the state "had a substantial reason for limiting the time within which paternity and support

---

[7] Accord *Pickett v. Brown*, 462 U.S. 1, 15 (1983) ("Tennessee tolls most actions during a child's minority."); *Mills v. Habluetzel*, 456 U.S. at 104 (O'Connor, J., concurring) ("[A] paternity suit is one of the few Texas causes of action not tolled during the minority of the plaintiff.").

actions could be brought." *Clark v. Jeter*, 486 U.S. at 465; *see Pickett v. Brown*, 462 U.S. at 17-18.

Due process protection stems from the development of an actual relationship between parent and child. "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he 'act[s] as a father toward his children.' " *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (quoting *Caban*, 441 U.S. at 389 n.7, 392); *see Rivera v. Minnich*, 483 U.S. at 580 n.7. This relationship "is entitled to protection against arbitrary state action as a matter of due process." *Lehr*, 463 U.S. at 260 (quoting *Caban*, 441 U.S. at 414).

The Mississippi Supreme Court's application of a six-year limitations period raises serious questions concerning the abridgement of the rights of the putative father who has developed a close and binding relationship with his child. In *Stanley v. Illinois*, the unwed father lived with his children and their mother for approximately eighteen years. 405 U.S. at 646. There was no evidence before the Court that the unwed father in *Stanley* had been neglectful or had not cared for his children. 405 U.S. at 655. In *Caban*, the unwed father had established a parental relationship with his children. 441 U.S. at 399. The evidence in the instant case demonstrates beyond any serious doubt that Petitioner has developed a close and binding relationship with his child sufficient to create protection under the Due Process Clause. In this context, the Due Process Clause protects putative fathers against arbitrary state action. There has been no find-

ing that Petitioner abandoned his child. Similarly, there has been no finding that Petitioner is an unfit parent. In fact, the record demonstrates just the opposite.[8]

Here, the mother has effectively severed Petitioner's ties to his child. He sought to invoke the aid of Mississippi law to protect his rights, but the procedures provided by the state to enforce those rights are inadequate and violate the Due Process Clause. An arbitrary limitations period precludes Petitioner, a responsible father, from participating in the rearing of his child.

CONCLUSION

For these reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE P. HEWES
(Counsel of Record)
BRUNINI, GRANTHAM, GROWER & HEWES
1400 Trustmark Building
Post Office Drawer 119
Jackson, Mississippi 39205

(601) 948-3101
Counsel for Petitioner

November 6, 1990

---

[8] The result in this case is truly ironic. Respondent Daniels, who, as a result of the Mississippi Supreme Court's decision, has been decreed to be the father of the child, is in fact the one who abandoned the child and his mother, as found by the Chancery Court of Hancock County.

APPENDIX

APPENDIX A

Supreme Court of Mississippi.

No. 89-CA-0384.

Joyce Elizabeth Daniels JOHNSON and
Claude Wayne Daniels

v.

Jerry LADNER a/k/a/ Gerald
Louis Ladner.

May 9, 1990.

Rehearing Denied Aug. 8, 1990.

Before HAWKINS, P.J., and SULLIVAN and ANDERSON, JJ.

SULLIVAN, Justice, for the Court:

Joyce Elizabeth Daniels (Johnson) and Claude Wayne Daniels have perfected this appeal from an order of the Hancock County Chancery Court establishing paternity of their minor child in the appellee, Jerry Ladner a/k/a Gerald Louis Ladner. Ladner, seven years after the birth of the child, filed a complaint in the chancery court for filiation, seeking to have himself declared the natural father of a child born in wedlock to the appellants.

At the time of the child's birth, his mother, Johnson was married to Claude Daniels. The birth certificate established Johnson and Daniels to be the mother and father. The chancery court ordered blood tests pursuant to Miss.Code Ann. § 93-9-21 (1972).

This Court granted an interlocutory appeal and vacated the blood tests ordered. Section 93-9-21, Miss.Code Ann. (1972), provided that the chancery court could order blood tests only at the request of a defendant in a paternity action. Subsequently, however, § 93-9-21 (1972) was amended, effective July 1, 1987. In a footnote, we stated that the amended portion provides standing for a plaintiff in a paternity action. *See Johnson v. Ladner*, 514 So.2d 327 (Miss.1987).

The amended statute, Miss.Code Ann. § 93-9-21 (1987), provides in pertinent part as follows:

> **§ 93-9-21. Blood tests and other tests; enforcement of order to submit; notice of witnesses testifying as to sexual intercourse with mother.**
>
> (1) The court, on motion of the plaintiff, the defendant, or its own motion, may order the mother, the alleged father and the child to submit to blood tests and any other tests which reasonably prove or disprove the probability of paternity.
>
> If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interest of justice so require.

Chancellor Stewart ordered all the parties to submit to blood tests. Johnson, Ladner, and the minor child's blood tests were performed by Dr. Robert Lewis at University Medical Center. Daniels, however, failed to comply with several orders requiring him to submit to a blood test.

The deposition of Dr. Robert Lewis, the director of paternity testing at University Medical Center, was provided to the chancellor during a hearing held June 22, 1988. Dr. Lewis stated in his deposition that he performed HLA, "human leukocyte antigen," paternity tests on Ladner and the minor child.

The chancery court entered a final judgment adjudicating and declaring Ladner to be the natural father of the minor child, born in lawful wedlock to the appellants, under the presumed authority of Miss.Code Ann. § 93-9-21 (1972), as Amended, in that Daniels refused to comply with the court's orders requiring him to submit to a blood test.

Johnson and Daniels file this appeal relying on three statements of issues to support their contention that the lower court erred in finding the minor child to be illegitimate, to wit:

I. **THE COURT ERRED IN RELYING ON THE MISSISSIPPI UNIFORM LAW ON PATERNITY ACT SECTION 93-9-1 THROUGH 93-9-49 OF THE MISSISSIPPI CODE OF 1972, ANNOTATED, TO ILLEGITIMATE A CHILD.**

II. **THE COURT ERRED IN OVERRULING THE MOTION TO DISMISS BASED ON THE STATUTE OF LIMITATIONS.**

III. **THE COURT ERRED IN REFUSING TO ALLOW APPELLANTS TO BE HEARD AND TO SUBMIT EVIDENCE IN THE BEST INTEREST OF THE MINOR CHILD, IN THEIR OPPOSITION OF SAID BLOOD TEST.**

I.

We reverse and render on issue II. The action was time barred by the statute of limitations; therefore, it is not necessary to address issues I or III.

DID THE TRIAL COURT ERR IN OVERRULING THE MOTION TO DISMISS BASED ON THE STATUTE OF LIMITATIONS?

Johnson and Daniels argue that Ladner's paternity action was time barred under Miss.Code Ann. § 93-9-9 (1972), or § 15-1-49 (1972).

The minor child was born January 26, 1978. Ladner filed his paternity suit October 15, 1985, over seven years after birth.

Miss.Code Ann. § 93-9-9 (1972)[1], provides as follows:

> Paternity may be determined upon the petition of the mother, the child or any public authority chargeable by law with the support of the child. If paternity has been lawfully determined, or has been acknowledged in writing according to the laws of this state, the liabilities of the father may be enforced in the same or other proceeding by the mother, the child or any public authority which has furnished or may furnish the reasonable expenses of the pregnancy, confinement, education, necessary support and maintenance, and medical or funeral expenses for the mother or the child. However, proceedings hereunder shall not be instituted by the mother after the child has reached the age of one year, unless the Defendant be absent from the state so that personal service of process cannot be had upon him, or, unless the defendant has acknowledged in writing that he is the father of the child.

The above section, clearly and unambiguously places the one year requirement on proceedings instituted by the mother. Ladner's paternity action does not fall within this one year statute.

The general catch-all statute of limitations is Miss.Code Ann. § 15-1-49 (1972)[2]. The statute which was applicable at the time provided as follows:

---

[1] Section 93-9-9 was amended, effective July 1, 1989, providing that enforcement under the paternity act could not be instituted after the child reaches the age of eighteen (18) years.

[2] Section 15-1-49 was amended, effective July 1, 1989, providing actions are time barred after three years.

§ 15-1-49. Limitations applicable to actions not otherwise specifically provided for.

All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

Ladner's argument is: (1) his cause of action did not accrue until September of 1985, when Johnson began cutting his access to the child; or (2) the statute of limitations was tolled during the period the child was "raised in his home" and when he had full access to the child.

This argument is without merit. A cause of action accrues when the suit may be maintained. Ladner's action for paternity accrued with the birth of the minor child. *See Grimsley v. Tyner*, 454 So.2d 482 (Miss.1984), and *Knight v. Moore*, 396 So.2d 31 (Miss.1981), *cert. denied* 454 U.S. 817, 102 S.Ct. 95, 70 L.Ed.2d 86 (1981). This case is dismissed, being statutorily time barred. *See Reich v. Jesco Inc.*, 526 So.2d 550 (Miss.1988).

REVERSED AND RENDERED.

ROY NOBLE LEE, C.J., HAWKINS, P.J., and PRATHER, ROBERTSON, ANDERSON, PITTMAN and BLASS, JJ., concur.

DAN M. LEE, P.J., not participating.

APPENDIX B

Supreme Court of Mississippi
Linda Stone, Clerk
Third Floor Gartin Building
450 High Street
P.O. Box 249
Jackson, Mississippi 39205-0249

DEPUTY CLERKS
YVONNE BURNHAM
KATHY GILLIS

TELEPHONE:
601/359-3694
FAX:
601/359-2407

August 8, 1990

Frank P. Wittmann III
Attorney at Law
Box 1648
Gulfport MS 39501

Floyd J. Logan
2211 24th Avenue
P O Box 1508
Gulfport MS 39502

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 8th Day of August, 1990.

Supreme Court Case #89-CA-0384

Trial Court Case #18144

Joyce Elizabeth Daniels Johnson and
Claude Wayne Daniels

vs.

Jerry Ladner a/k/a Gerald Louis Ladner

Petition for Rehearing Denied. Dan Lee, P. J., Not Participating.

Supreme Court Clerk

lwp

ccs: Dixie Lynn Vaughn
George P. Hewes III

APPENDIX C

IN THE CHANCERY COURT OF HANCOCK COUNTY, MISSISSIPPI

NO. 18,144

JERRY LADNER

PLAINTIFF

VERSUS

JOYCE ELIZABETH DANIELS JOHNSON
AND CLAUDE WAYNE DANIELS

DEFENDANT

FILED MAR 2 1989

FINAL JUDGMENT

This Cause this day came on to be heard on a final hearing in this matter and the Court finds and determines as follows, to-wit:

I.

That this Court has jurisdiction over the parties in the subject matter herein.

II.

That the Mississippi State Department of Health has entered an appearance herein by the issuance of a birth certificate in this matter and that a final adjudication should be made herein.

III.

That Plaintiffs motion to correct clerical error changing the name of JERRY LADNER to GERALD LOUIS LADNER, be granted. It is therefore;

ORDERED AND ADJUDGED that GERALD LOUIS LADNER a/k/a JERRY LADNER be and is hereby declared to be the natural father of JERRY WAYNE DANIELS, a minor, born January 26, 1978 in accordance with Section 93-9-21 of the Mississippi Code of 1972 as amended and that the birth certificate of JERRY WAYNE DANIELS be changed so as to reflect that the natural father of the child is GERALD LOUIS LADNER a/k/a JERRY LADNER, and that the name of the child is JERRY WAYNE LADNER. It is further;

ORDERED AND ADJUDGED that Plaintiff, GERALD LOUIS LADNER a/k/a JERRY LADNER, shall be required to pay JOYCE ELIZABETH DANIELS JOHNSON, the sum of One Hundred Fifty and No/100 Dollars ($150.00) per month, as support of the minor child, JERRY WAYNE LADNER, beginning January 1, 1989, said amount to be paid on the 1st day of each and every month thereafter, until the child reaches the age of majority, becomes self supporting or by further order of this Court.

That Plaintiff, GERALD LOUIS LADNER a/k/a JERRY LADNER, be granted visitation with the minor child as follows:

Every other weekend, beginning December 9, 1988, from 6:00 p.m. on Friday until 7:00 p.m. on Sunday. That Plaintiff shall have visitation with the minor child on the holidays of Easter and Labor Day on odd numbered years, and July 4 and Thanksgiving on even numbered years, beginning at 6:00 p.m. on the day prior to the holiday and ending at 7:00 p.m. the day of the holiday. Further that Plaintiff shall have visitation with the said minor child from the beginning of Christmas school holidays until 2:00 p.m. on Christmas Day on odd numbered years and from 2:00 p.m. on Christmas Day until 7:00 p.m. New Year's Day on even numbered years. That Plaintiff shall have visitation for four weeks during the summer, the last two (2) weeks in July and first to (2) weeks in August of each

year. Defendant, Joyce Daniels Johnson shall have weekend visitation the weekend following the second week of summer visitation. That on all visitation Defendant will transfer the said minor child to the home of the Plaintiff and that the Plaintiff shall return the said child to the Defendant at the termination of the visitation. It is further;

ORDERED AND ADJUDGED that the fees submitted herein by the Guardian ad Litium, in this Cause the Honorable Faye Spayde, in the sum of $978.32, be and are hereby approved and this costs along with all costs herein be taxed equally to the parties, GERALD LOUIS LADNER a/k/a JERRY LADNER and JOYCE ELIZABETH DANIELS JOHNSON.

SO ORDERED AND ADJUDGED this 2 day of March, 1989.

/s/ Wm. L. Stewart
CHANCELLOR

APPROVED:

/s/ Dixie L. Vaughn
DIXIE L. VAUGHN,
ATTORNEY FOR PLAINTIFF

/s/ Frank P. Wittmann, III
FRANK P. WITTMANN, III,
ATTORNEY FOR DEFENDANTS.

APPENDIX D

IN THE CHANCERY COURT OF HANCOCK COUNTY, MISSISSIPPI

NO. 18,144

JERRY LADNER

PLAINTIFF

VERSUS

JOYCE ELIZABETH DANIELS JOHNSON
AND CLAUDE WAYNE DANIELS

DEFENDANTS

FILED SEP 2 1988

ORDER

This civil action came on for hearing, the Court having previously entered its Order of June 24, 1988, ordering Defendant, Claude Wayne Daniels, to submit to a blood test in accordance with *Miss. Code Ann.* Section 93-9-21 (1987 Supp.) within twenty (20) days from June 22, 1988, or to set a firm date for a blood test examination within the twenty day period, and the Court, being fully advised in the premises, hereby FINDS, ORDERS AND ADJUDGES as follows:

1. The Court has jurisdiction of the parties and of the subject matter of this civil action.

2. The allegation of the Complaint are true, and the relief prayed for therein should be granted.

3. On June 24, 1988, the Court entered an Order requiring the Defendant, Claude Wayne Daniels, to submit to a blood test in accordance with *Miss. Code Ann.* Section 93-9-21 (1987 Supp.) within twenty days from June 22,

1988, or to set a firm date for a blood test examination within the twenty day period, failing in which, the question of paternity would be resolved against him and in favor of the Plaintiff, Jerry Ladner, as authorized by *Miss. Code Ann.* Section 93-9-21 (1987 Supp.).

4. The Defendant, Claude Wayne Daniels, has willfully failed to comply with the June 24, 1988, Order of the Court; no pleadings have been filed to request extension of time; and the case is ripe for entry of an order of filiation due process having been fulfilled.

5. The question of paternity is thereby resolved against Defendant, Claude Wayne Daniels, and in favor of the Plaintiff, Jerry Ladner.

6. The Court hereby enters this Order of Filiation pursuant to *Miss. Code Ann.* Section 93-9-21 (1987 Supp.), declaring Plaintiff, Jerry Ladner, as the natural father of Jerry Wayne Daniels, a minor, born January 26, 1978.

7. The birth certificate of the minor child, Jerry Wayne Daniels, is ordered to be modified to reflect the name of the minor child as JERRY WAYNE LADNER. The Chancery Clerk of Hancock County, Mississippi, is directed to forthwith transmit to the Registrar of Vital Statistics on a form prescribed by the Registrar, a written notification of the entry of this Order of Filiation together with a certified copy of this Order. The Registrar of Vital Statistics shall forthwith cause the birth certificate of Jerry Wayne Daniels, a minor born January 26, 1978, to be changed so as to reflect that the natural father of the child is the Plaintiff, Jerry Ladner, and that the name of the child is Jerry Wayne Ladner.

8. The Plaintiff, Jerry Ladner, shall have joint custody of the minor child every other weekend from 6:00 p.m. on Friday until 6:00 p.m. on Sunday; from 9:00 a.m. until 6:00 p.m. on Easter day and July 4 in odd numbered years; from 9:00 a.m. until 6:00 pm. on Labor Day and Thanks-

giving Day during even numbered years; the first two weeks of June and the first two weeks of August of each year; and from 9:00 a.m. until 6:00 p.m. on Father's Day of each year. The Plaintiff shall also have Christmas visitation with the minor child from 2:00 p.m. on December 18 to 2:00 p.m. on December 25 during even numbered years, and from 2:00 p.m. on December 25 until 2:00 p.m. on December 31 during odd numbered years.

9. Costs of court are hereby taxed to the Defendants, for all of which let execution issue.

SO ORDERED AND ADJUDGED this 2nd day of September, 1988.

/s/ Wm. L. Stewart
CHANCELLOR

APPENDIX E

IN THE CHANCERY COURT OF HANCOCK COUNTY, MISSISSIPPI

NO. 18,144

JERRY LADNER

PLAINTIFF

VERSUS

JOYCE ELIZABETH DANIELS JOHNSON
AND CLAUDE WAYNE DANIELS

DEFENDANTS

FILED JUN 24 1988

ORDER

THIS CAUSE came before the Court for a trial on the merits of the case. On Motion by the Plaintiff, Ladner, for a Judgment resolving the question of paternity against the Defendant, Claude Wayne Daniels, due to his refusal to submit to a Court ordered blood test the Court, sua sponte, granted Claude Wayne Daniels twenty (20) days from June 22, 1988, in which to submit to a blood test or to make firm arrangements for a blood test examination. The Court also considered the objection of the Plaintiff to the grant of additional time predicated upon the Defendant, Daniels, having been ordered on three previous occasions to submit to a blood test, but refusing to do so, overruled the objection but reserved ruling on the Motion. The Court also considered the Motion of the Defendants to dismiss the subject case based on the statute of limitations, or alternatively, on the doctrine of Laches. The Court finds that the Motion to Dismiss is not well taken and should be denied.

IT IS THEREFORE, ORDERED AND ADJUDGED that the Defendant, Claude Wayne Daniels, be and he is hereby directed and strictly ordered to submit to a blood test in accordance with Section 93-9-21 of the Mississippi Code of 1972, Annotated, within twenty (20) days from June 22, 1988, or to set a firm date for a blood test examination within the twenty day period. It is further,

ORDERED AND ADJUDGED that the Defendant, Daniels, through his attorney, Frank Wittmann, shall take affirmative action, within the twenty day period specified herein, to schedule the blood test examination. If the Defendant, Claude Wayne Daniels, fails to submit to such test, or if he neglects or fails to take affirmative action to set up a blood test examination during the twenty day period of time, then the question of paternity shall be resolved against him and in favor of the Plaintiff as authorized by Section 93-9-21 of the Mississippi Code of 1972, Annotated. It is further,

ORDERED AND ADJUDGED that the above cause be and the same is hereby continued for a period of twenty (20) days at which time the Court Administrator is directed to set the matter for trial, this case to be granted preference in the order of trial settings. It is further,

ORDERED AND ADJUDGED that the Defendants Motion to Dismiss based on the statute of limitations, or alternatively, on the doctrine of Laches be and the same is hereby denied. It is further,

ORDERED AND ADJUDGED that the Defendant, Daniels, through his attorney, Wittmann, shall advise the Plaintiff, through his attorney, Joe Sam Owen, within ten (10) days from date of this Order as to when the Daniels blood test examination will be conducted. It is further,

ORDERED AND ADJUDGED that the Plaintiff, Jerry Ladner, shall be entitled to visitation with the minor child on one of the next three weekends, the option as to which

weekend to be granted to the Plaintiff. However, if the scheduled blood test examination shall require a delay of more than twenty days then the Defendant, Joyce Elizabeth Daniels Johnson, is hereby ordered to allow the Plaintiff, Jerry Ladner, additional visitation once every three weekends thereafter until this case is finally tried on the merits.

SO ORDERED AND ADJUDGED this 24 day of June, 1988.

/s/ Wm. L. Stewart
CHANCERY COURT JUDGE

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 89-CA-0384

JOYCE ELIZABETH DANIELS JOHNSON
AND CLAUDE WAYNE DANIELS

APPELLANTS

VERSUS

JERRY LADNER

APPELLEE

PETITION FOR REHEARING

INTRODUCTION

With deference, the decision in this case is a triumph of form over substance. There can be no serious question that the Appellee, Jerry Ladner, is the father of the child of the Appellant, Joyce Elizabeth Daniels Johnson. Such was the finding of the Chancellor on competent evidence and the child's birth certificate has been amended, pursuant to Court Order, to show that the father is Jerry Ladner and the child's proper name is Jerry Wayne Ladner rather than Jerry Wayne Daniels. The evidence before the Chancellor included the following:

1. The finding of Dr. Robert E. Lewis, Jr., Director, Paternity Testing Laboratory, University of Mississippi Medical Center, that the relative chance of paternity of Appellee was 97.04%. "Paternity is very likely." (Record of Excerpts, hereafter "R.", p. 19)

2. The refusal by Claude Wayne Daniels, husband of the mother at the time of birth, to submit to a blood test after

being ordered to do so by the Chancery Court of Hancock County on four separate occasions. (R. 24)

3. The sworn interrogatory answer of the Appellee, uncontroverted in any way, shape or form, that for the ten month period preceding the birth of the child he engaged in sexual intercourse with the Appellant Joyce Daniels Johnson, at least three to four times a week. (R. 169)

4. The sworn response to Interrogatory No. 12, as follows:

> 12. Do you contend that you have assisted financially in the birth and support of said minor child and if so, please state the amount of said payments, the date of said payments, and the persons knowledgeable of said payments.
>
> ANSWER: Joyce lived in my home about one to two years before she got pregnant and stayed about three years after the baby's birth. I provided a home, food and anything she and the baby needed while she went to school. She moved back to her father's home about three years after the baby was born and about a month later she brought the baby back to live in my home. The baby was raised 99% of his life in my home; I sent him to the best school available; paid for this schooling; provided his transportation to and from school every day; bought his food and some clothes.

(R. 170)

5. The sworn response to Interrogatory No. 15, as follows:

> 15. Do you contend that this child was commonly reputed to be the child of yours in the community in which you lived and if so, please state in each fact upon which you rely to support your allegations.

> ANSWER: Joyce told Christin Luxich the child was mine. Others who know of this is my family, Joyce's family, Claude Daniels' family, and Joyce's friends.

(R. 170)

6. The sworn Complaint for Divorce filed by Joyce Elizabeth Smith Daniels against the other Appellant herein, Claude Wayne Daniels, alleges that the Plaintiff "has had custody of the minor child since his birth and that she has cared for and supported him. She further shows that the Defendant has not sent any support for the minor. . . ." (R. 163)[1]

The Final Decree (R. 173) entered on this Complaint, dated June 20, 1979, granted the divorce sought and contained no finding or recitation that the "minor male child, Jerry Wayne Daniels," was the child of the divorcing parties. The Decree granted complete custody of the child to the Plaintiff, imposing no child support obligation on the Defendant. (R. 173) How many of you former Chancellors would have entered a divorce Decree imposing no child support obligation on the *father* of the child?

I.

By Acknowledging Paternity and Demonstrating A Commitment to Financially Support His Child and Assist In His Upbringing, Appellee Acquired Substantial Protection Under The Due Process Clause.

This is not the typical paternity-child support case where the natural father denies paternity. Nor is it a case where the natural father has avoided contact with the child or

---

[1] The Record of Excerpts contains two pages numbered 163. The portion of the Complaint referenced is on the second page numbered 163 and follows numbered page 173.

shunned his parental responsibility to support the child. Just the reverse is true. The child lived with the Appellee for the first 8 years of his life and, as was the case in *Karenina by Vronsky v. Presley*, 526 So.2d 518 (Miss. 1988), the parties had an "informal and originally rather workable custody, visitation and support arrangement" until a quarrel over Appellee's desire to take the child to Florida for a visit, following which Appellant Johnson began denying Appellee access to his son. (R. 168)

The Courts recognize the distinction between the legal rights of one who acknowledges to be the father and wants to share in the raising and support of his child and one who avoids and eschews such responsibility.

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'coming forward to participate in the rearing of his child', his interest in personal contact with his child acquires substantial protection under the due process clause.

Lehr v. Robertson, 463 U.S. 248, 77 L.Ed.2d 614 (1983), *citing Caban v. Mohammed*, 441 U.S. 380, 60 L.Ed.2d 297 (1979).

In *Caban*, a New York statute granted an unwed mother the authority to block the adoption of her child simply by withholding her consent, but did not give an unwed father a similar right. The unwed, natural father of two children challenged the constitutionality of the New York statute after a New York Surrogate, without the father's consent, granted a petition to adopt the children by their natural mother and her present husband. That is precisely what will be attempted in this case unless Appellee's parental rights are recognized. In *Caban*, as here, the natural father had resided with the mother for several years, was identified as the father on their birth certificates, had contributed to their support and had maintained consistent contact with the children after separating from their

mother. The Supreme Court held that the New York statute violated the equal protection clause of the Fourteenth Amendment and that there was no universal difference between the maternal and paternal relations during the child's development justifying the broad gender based distinction of the statute.

Even the dissenters in *Caban* recognized the very significant point here involved:

> I assume that, if and when one develops, the relationship between a father and his natural child is entitled to protection against arbitrary state action as a matter of due process. 441 U.S. at 414, *citing Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.551, 91 S.Ct. 1208 (1972).

A key ingredient in all of these cases where the rights of the natural father are protected is the fact that he has established a substantial relationship with the child and is willing to admit his paternity. The effect of the Court's ruling is to deny fatherhood to such a person and establish paternity on the part of a man who, according to his ex-wife in the Complaint for divorce, deserted her without justification and

> . . . has not sent any support for the minor and that he has not showed any love or affection for him, she further shows that the Defendant has had no formal education and that he cannot read or write and she believes it would be to the best interest of the minor that she have complete custody and control of said minor.

(R. 163)

The action of this Court in this case would decree this person to be the father of this child (when the proof is overwhelming that he is not) in lieu of his real father who loves the child, wants to support him and participate in his rearing.

The Supreme Court of the United States, in *Quilloin v. Walcott*, 434 U.S. 246, 54 L.Ed.2d 511 (1978), recognized the due process right of natural fathers to maintain a parental relationship with their children absent a finding that they are unfit as parents. The only proof on this score is that the Appellee is willing and anxious to support his child, as evidenced by the lawsuit he filed.

In the Caban case, *supra*, the Court noted it was entirely appropriate for the State of New York to make a distinction between unwed fathers who had abandoned their children and those who had undertaken to discharge their parental responsibility by participating in the rearing and support of the child. The former could be constitutionally denied a say in the adoption of the child whereas the latter could not. *Caban*, 441 U.S. at 392. The point is, fathers such as the Appellee here who attempt to discharge their parental responsibility "acquire substantial protection under the due process clause."

II.

The Presumption Of Legitimacy Has Been Effectively Rebutted By Compelling Evidence That Appellee Is The Father Of This Child.

This Court is no doubt concerned, and rightly so, that sustaining Appellee's position would declare the child illegitimate. On the other hand, dismissing Appellee's complaint renders the child the legitimate son of one who is an apparent illiterate, who abandoned the child and mother, and who has evidenced no concern whatsoever for the child's well being. This is a tough choice but, with deference, the choice is clear and is a choice this Court has made in the past when justified by the facts. *Baker by Williams v. Williams*, 503 So.2d 249 (Miss. 1987); *Karenina by Vronsky v. Presley*, 526 So.2d 518 (Miss. 1988).

First, the presumption of legitimacy that a child born to a married couple is a rebuttable presumption. *Baker By*

Williams v. Williams, supra. As was said as early as *Moore v. Smith,* 172 So. 317 (Miss. 1937):

> The matrimonial relationship is sacred but not sacrosanct. The rule generally is that it can, and justice often requires that it be, invaded and its secrets laid bare. . . .

This is such a case. As was stated in *Baker,* "equally important in the development of our jurisprudence is another fundamental concept of obtaining fairness, justice and equality". In short, the Court cannot close its eyes to the truth, no matter how noble the motives. The truth has been established beyond a reasonable doubt by the HLA blood test conducted by Dr. Lewis. The Court noted in the Baker case, and the earlier case of *Grimsley v. Tyner,* 454 So.2d 482 (Miss. 1984), that a properly conducted HLA test was adequate to rebut the presumption of legitimacy accorded a child born to a married mother. As was noted in a case from another jurisdiction, *Bartlett v. Commonwealth ex rel. Calloway,* 705 S.W.2d 470 (Ky. 1986):

> "By this opinion we acknowledge the importance of HLA blood testing in supplying evidence as necessary to overcome the presumption of legitimacy and the requirement of proof beyond a reasonable doubt. . . . When the advances of science serve to assist in the discovery of truth, the law must accommodate them. The law cannot pick and choose when truth will prevail.

The facts herein are very similar to those in *Karenina by Vronsky v. Presley, supra,* a recent decision of this Court. In that case, both the natural father and the natural mother were married to other persons at the time the child was conceived. Although the birth certificate indicated the parents were the mother and the man to whom she was married, the natural father made no attempt to conceal his identity as the father of the child. He paid the

hospitalization and medical expense incident to the birth of the child and, under an informal agreement, had visitation privileges every other weekend, at Christmas and during the summer. This arrangement continued until a dispute arose following a denial of the natural father's request that he be allowed to adopt the child. A suit on behalf of the minor child was filed approximately five years after her birth, the suit being brought by the natural father, in his capacity as father and next friend.

A petition for adoption by the then husband of the mother was consolidated with the paternity suit and, following trial, the Court held the evidence of the natural father's paternity was "overwhelmingly clear and convincing." The child's birth certificate was changed to reflect the name of her natural father and that he, in fact, was her father. On the matter of the rebuttable presumption, the Court had this to say:

> We do not wish to be seen insensitive to the policy argument Kiril advances nor to Anna's wish that her child not be declared illegitimate. *Rather, we bow to the notion that positive law should not declare a fact that which natural law shows could not have been.* Suffice it to say that the evidence before the Chancery Court was such that the presumption of legitimacy was effectively rebutted.

Such is the case here. The old axiom is that the legal process is a "search for the truth" and the truth is that the Appellee, Jerry Ladner, is the natural father of Jerry Wayne Ladner.

III.

As Applied, Mississippi's Catch-All Statute of Limitations Deprives Appellee Of Due Process And Equal Protection In Exercising His Right To Have Personal Contact With And Participate In Rearing His Son.

In *Mills v. Habluetzel*, 456 U.S. 91, 71 L.Ed.2d 770 (1982), the Supreme Court established the following test for evaluating equal protection challenges to statutes of limitations that apply to suits to establish paternity:

> First, the period of obtaining support . . . must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related to the state's interest in avoiding the litigation of stale or fraudulent claims.

In *Clark v. Jeter*, 486 U.S. ___, L.Ed.2d 465 (1988), a unanimous court held unconstitutional the application of Pennsylvania's six-year statute of limitations to bar a paternity suit brought by the mother on behalf of her minor illegitimate child. In applying the second portion of the *Mills* test quoted above, the court held that the six-year limitation period was not substantially related to Pennsylvania's interest in avoiding stale or fraudulent claims. The court cited the following in support of its holding:

> 1. In a number of circumstances, Pennsylvania allowed the issue of paternity to be litigated more than six years after the birth of the child. For example, Pennsylvania's statute governing paternity suits allowed suits to be brought after six years if brought within two years of a support payment made by the father. Also, there was no limit on when pa-

ternity could be litigated in connection with an intestacy suit. In addition, there was no statute of limitations applicable to a father's action to establish paternity.

2. Pennsylvania had recently enacted a statute that tolled the statute of limitations during the child's minority for most other suits that could be brought by a minor child.

3. Pennsylvania recently enacted an 18-year statute of limitations for paternity and support actions in order to conform to provisions governing such suits brought under federal law.

4. Increasingly sophisticated scientific tests facilitate the establishing of paternity, regardless of the child's age. This eliminates the problem of evidence becoming "stale" due to a longer period of limitation.

Clark, 100 L.Ed.2d at 473 & 474.

In applying the same analysis to the circumstances of Appellee herein, it becomes apparent that Mississippi's position is strikingly similar to that of Pennsylvania as characterized in *Clark v. Jeter*. The Mississippi Uniform Law on Paternity, Miss. Code Ann. § 93-9-1, imposes no time limitation if the father has voluntarily admitted paternity in writing; other than as applied by the court herein, there is no provision in the Mississippi statutes for a period of limitation on paternity suits brought by fathers; Miss. Code Ann. § 15-1-59 tolls the statute of limitations during a child's minority on a wide range of suits brought on behalf of the child. All of these provisions "cast doubt on the state's purported interest in avoiding the litigation of stale or fraudulent claims." *Clark*, 100 L.Ed.2d at 474. In the context of the second part of the *Mills* test, Appellee's case comes squarely within the holding of *Clark v. Jeter*.

In applying the first part of the *Mills* test to determine the reasonableness of the limitation imposed by Pennsylvania, the Court held "Even six years does not necessarily provide a reasonable opportunity to assert a claim on behalf of an illegitimate child." *Id.* at 473. The father, no less than the mother, has a constitutionally protected interest in asserting such a claim. The action of this Court in this case, however, would limit the father to a period which a unanimous Court in *Clark v. Jeter* has already held to be inadequate for the protection of the fundamental rights involved.

Further, the action of the Court in this case violates the Equal Protection Clause of the Fourteenth Amendment. Under Miss. Code Ann. § 93-9-9 if the father has admitted paternity in writing, the mother or the appropriate state agency has an *unlimited* period in which to sue to establish paternity. Appellee has been limited to six years. This gender-based discrimination is clearly unconstitutional when measured against the result and the rule of law established in *Caban v. Mohammed, supra.*

As mentioned above, in *Caban* the United States Supreme Court struck down a state statute permitting an unwed mother, but not an unwed father, to prevent the adoption of their child by withholding consent. This discrimination was held to be unjustified:

> There is no reason to believe that the [Caban children] had a relationship with their mother unrivaled by the affection and concern of their father. We reject, therefore, that the broad, gender-based distinction . . . is required by any universal difference between maternal and paternal relations at every phase a child's development.

Caban, 60 L. Ed. 2d at 305.

As disclosed by the Record, the child lived with Appellee for the first 8 years of his life. Appellee provided for his

shelter, his food, enrolled him in school and generally discharged the duties one expects of a mother as well as a father. Under these circumstances, having acknowledged paternity in a variety of ways, there is no limitation on the time within which the mother could bring an action to formally adjudicate paternity and require the father to support the child. What state interest or policy is served by limiting the father to six years to establish paternity?

IV.

As This Court Has Previously Recognized, Equity Demands That Substance Triumph Over Form Where Fundamental Rights Are at Stake.

As pointed out hereinabove, there are numerous examples in Mississippi Jurisprudence where the six-year period of limitation did not apply in a paternity suit. In the case of *Baker by Williams v. Williams, supra,* suit was brought by an 11-year-old child, suing by her mother as her next friend. Thus, the suit was brought more than 11 years after the birth of the child.[2] The Baker suit is unusual and illustrates just how far the courts have come in dealing with this very difficult matter of the presumption of legitimacy in the case of a child born to a married woman. This court very courageously recognized, in the face of the presumption of legitimacy, "one of the strongest presumptions known to the law", that "equally important in the development of our jurisprudence is another fundamental concept of obtaining fairness, justice and equality."

In the Baker case the child sought to establish that her stepfather was her natural father, not the man to whom

---

[2] I'm sure it is lost on no one that had the Appellee filed his suit on behalf of his child, as father and next friend, the limitations plea would not have even been raised. Again, the Court's decision at this stage is form over substance.

her mother was married at the time of birth. This notwithstanding the recitations in the birth certificate to the contrary as well as those in the final decree of divorce, dissolving the marriage of the mother and the former husband. An effort was made to dismiss this suit on the basis of the affirmative defenses of estoppel, laches and res judicata. The court disposed of each of these assertions on the basis of sound legal reasoning but I'm sure was strongly persuaded by the fact that the HLA blood test showed to a 99 percent probability that the stepfather was the father of the child.

This court has recognized the right of putative fathers to file a petition for filiation. *Grimsley v. Tyner, supra.* Appellee has done that. Understandably, he did not do so until the Appellant Joyce Elizabeth Smith Daniels Johnson denied him access to his child. Until that time, there was no point in seeking to establish a legal adjudication of paternity. He was able to be with the child, to assist in his upbringing and to contribute to his nurture and support. Until Appellee was denied access, there was no reason to stigmatize his child with a formal paternity proceeding.

As demonstrated hereinabove, the person to whom the mother was married at the time of birth is contributing nothing to the support of the child, and never has. If the court's ruling is allowed to stand, there will be no obligation on the part of Appellee to contribute to this child's support. What possible state interest could be served by a policy which discourages (and in this case effectively blocks) a natural father who wishes to do so, from supporting and assisting in raising his child? That's the effect of the ruling in this case.

CONCLUSION

This is not a case involving money or property. Something much more precious and significant is involved. It is the right of a natural parent to be with his own child to watch him grow and develop and to assist in that growth and development. Appellee acquired substantial protection under the due process clause by his commendable actions in acknowledging himself to be the father of the child and demonstrating a full commitment to the responsibilities of parenthood. This is conduct which should be protected and encouraged rather than thwarted by the courts. As applied, § 15-1-49 is unconstitutional under the Equal Protection and Due Process clauses of the Fourteenth Amendment. The earlier decision of this court should be withdrawn and the decree of the Chancery Court of Hancock County affirmed.

Respectfully submitted,

BRUNINI, GRANTHAM, GROWER & HEWES

BY: /s/ George P. Hewes, III
GEORGE P. HEWES, III

BY: /s/ Dixie L. Vaughn
DIXIE L. VAUGHN

ATTORNEYS FOR APPELLEE

GEORGE P. HEWES, III
BRUNINI, GRANTHAM, GROWER & HEWES
1400 Trustmark Building
Post Office Drawer 119
Jackson, Mississippi 39205
Telephone: (601) 948-3101

DIXIE L. VAUGHN
ATTORNEY AT LAW
P. O. Box 341
Gulfport, Mississippi 39502-0341
Telephone: (601) 864-7766

[Certificate of service omitted in printing]

FILED
DEC 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-730

In The

Supreme Court of the United States

October Term, 1990

JERRY LADNER,

Petitioner,

v.

JOYCE ELIZABETH DANIELS JOHNSON
and CLAUDE WAYNE DANIELS,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Mississippi

BRIEF OF RESPONDENTS IN OPPOSITION

FLOYD J. LOGAN
(Counsel of Record)
LOGAN & WEATHERLY
2211 24th Avenue
Post Office Box 1508
Gulfport, Mississippi 39502

(601) 864-3666

FRANK P. WITTMANN, III
1820 22nd Avenue
Post Office Box 1648
Gulfport, Mississippi 39502

(601) 864-1600

Counsel for Respondents

December 17, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 90-730

In The

Supreme Court of the United States

October Term, 1990

JERRY LADNER,

Petitioner,

v.

JOYCE ELIZABETH DANIELS JOHNSON
and CLAUDE WAYNE DANIELS,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Mississippi

BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF CASE

In support of his petition, the putative father alleges that he had a "significant, enduring and developed relationship with his child." However, there has been no finding by any lower court of any such relationship, and the record is totally devoid of any evidentiary proof to support such assertion. In his trial court pleadings, the putative father makes some factual allegations which might be argued to support such a conclusion, but these

allegations are denied in Respondents' pleadings and are, therefore, not properly before this court.

Throughout the course of this litigation, there was no testimony or other evidence presented except the results of HLA Blood Test. The only uncontroverted facts are that Respondent, Joyce Elizabeth Daniels Johnson lived with Petitioner and his wife, from July, 1977 to July, 1979. At the time of conception, which was April-May, 1977, Respondents, Joyce Johnson and Claude Wayne Daniels, lived together as husband and wife. She later moved to the home of her father, taking the child, who was approximately one and one-half (1½) years old at the time. Petitioner was known only as the child's godfather and was asked at various times to babysit with the child at the home of the Petitioner and his wife. Subsequent to Respondent moving out of Petitioner's home in 1979, Respondent continued to allow Petitioner to visit the child, but she denied that he provided any support for the child.

The issues of equal protection and due process were not raised below until the Petition for re-hearing was filed in the Mississippi Supreme Court.

ARGUMENT IN OPPOSITION TO GRANTING OF WRIT

I. THE APPLICATION OF MISSISSIPPI CATCH ALL STATUTE OF LIMITATION DOES NOT DENY THE PUTATIVE FATHER CONSTITUTIONAL PROTECTION UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION.

A. THE DUE PROCESS ARGUMENT

A PUTATIVE FATHER SEEKING TO BE DECLARED THE LEGAL FATHER OF A CHILD BORN DURING WEDLOCK DOES NOT ASSERT A "LIBERTY INTEREST" SUFFICIENT TO REQUIRE DUE PROCESS PROTECTION.

In the case at bar, the facts show Petitioner waited almost eight (8) years before he filed his action and in this case he does not seek to legitimate the child, but to illegitimate the child. This leads to the ultimate question. Does a putative father have an open ended Constitutional right to illegitimate a child for nothing more than the self-serving purpose of having the child carry his name? Petitioner argues that the application of the 6 year "catch all" statute of limitations to his claim denies him due process as a putative father. This argument is predicated on the assumption that Petitioner, as the putative father, has a constitutionally protected liberty interest in being declared the natural father of the child. In defining the parameters of the due process clause, this court in *Michael H. v. Gerald D.*, 491 U.S. ___, 105 L.Ed.2d 91, 109 S.Ct. 2333 (1989) stated:

> . . . we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation is hard to

objectify), but also that it be an interest traditionally protected by our society. 105 L.Ed.2d, at p. 105.

In that case, a putative father sought to have a California statute declared unconstitutional for denying his due process rights as a putative father. The statute in question provided that (1) the child of a married woman cohabiting with her husband is presumed to be a child of the marriage where the husband is not impotent or sterile and (2) the presumption may be rebutted by blood tests but only if motion for such blood tests is made within 2 years from the child's birth. A liberty interest was claimed by the putative father based on biological fatherhood plus an established parental relationship. This court held that the putative father's substantive due process claim failed, because the power of a natural father to claim paternity of a child born into a woman's existing marriage with another man, and to assert parental rights over such a child, is not so firmly embedded within society's traditions as to be a fundamental right qualifying as a liberty interest. Similarly, in this case, where the evidence can support a finding of no more than biological fatherhood, Petitioner has failed to establish a liberty interest protected by the due process clause.

B. THE EQUAL PROTECTION CLAIM

THERE IS A RATIONAL BASIS FOR DISTINGUISHING BETWEEN THE LIMITATIONS PERIOD APPLICABLE TO THE CHILD AND/OR MOTHER'S RIGHT TO CLAIM SUPPORT AND THE LIMITATIONS PERIOD APPLICABLE TO A PUTATIVE FATHER'S ACTION TO BE DECLARED THE LEGAL FATHER OF A CHILD BORN IN WEDLOCK.

Petitioner claims his equal protection rights were violated in that the 6 year "catch all" statute of

limitations was applied to his claim as a putative father while different and more lenghty limitations periods apply to the claims of the mother and claims on behalf of the child. (Secs. 15-1-49, 93-9-9 Miss. Code Ann.) He argues that such "gender based" discrimination is a violation of equal protection. It is first noted that the distinction here is not of males vs. females, but of putative fathers as a class vs. natural mothers and legitimate or illegitimate children as a class. This court has heretofore recognized that such distinctions can survive equal protection scrutiny. *Mills v. Habluetzel*, 456 U.S. 91 (1982).

> Therefore, in support suits by illegitimate children more than in support suits by legitimate children, the state has an interest in preventing the prosecution of stale or fraudulent claims, and may impose greater restrictions on the former than it imposes on the latter. Such restrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest. 456 U.S. at p. 98,99.

Since the claimant in the *Habluetzel* case was an illegitimate child born out of wedlock, this Court found that the one year Texas statute of limitations was not substantially related to the State's interest in avoiding the litigation of stale or fradulent claims.

The state has an interest in promoting family harmony and stability. The state further has an interest in the early determination of paternity questions and the prompt determination of parental responsibility. The continuation of a stable, continuous and harmonious family environment for the rearing of children is a substantial state interest. *Michael H. v. Gerald D., supra.*

> Where, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter. 105 L.Ed.2d, at p. 109.

Obviously, with respect to the child and its mother, the state has an interest in seeing that the child is adequately cared for and supported during its minority and does not become a public charge. The 18 year statue of limitations in favor of the mother and child rationally promotes this state interest. (Sec. 93-9-9 Miss. Code Ann.)

In Mississippi, the rule as to presumption of paternity is established by a long line of Supreme Court cases and, it can be summarized by the wording of *Brabham v. Brabham*, 483 So.2d 341 (Miss. 1986):

> "The presumption that a child born in wedlock is a legitimate child is one of the strongest presumptions known to the law, (cites omitted) and may be rebutted only by proof beyond a reasonable doubt that the husband is not the father." (cites omitted), 483 So.2d at p. 342.

As the Court stated in *Michael H. and Victoria D. v. Gerald D., supra*:

> "Of course the conclusive presumption not only expresses the State's substantive policy but also furthers it, excluding inquiries into the child's paternity that would be destructive of family integrity and privacy." 105 L.Ed.2d, at p. 103, 104.

The evidence in this case can support a finding of no more than that Petitioner is the biological father. There is no evidentiary basis for a finding that Petitioner has

attempted to provide any of the comforts or incidents of fatherhood to the child or provided any support to the child. There is further no evidence of any affection or bonding between Petitioner and the child to justify an invasion of the child's existing family relationship.

Since the application of the 6 year Mississippi statute to limitations to Petitioner's assertions of his rights pursues a legitimate end by rational means, Petitioner has not been denied equal protection.

Respondent cites *Caban v. Mohammad*, 441 U.S. 380 (1979) and *Stanley v. Illinois*, 405 U.S. 645 (1972). Both of these cases involved unwed mothers and unwed fathers. The Court in *Stanley* stated:

> "the private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id.* at 651.

Stanley involved an acknowledged father's efforts to prevent his children from being declared wards of the state upon the death of their mother with whom Stanley had intermittently lived for 18 years. At the time of conception and birth of the children, the mother was unmarried, as was Stanley. Unlike the case at bar, no presumption of legitimacy was involved.

Petitioner cites *Rivera v. Minnich*, 483 U.S. 574 (1987), *Mills v. Habluetzel, supra*, and *Clark v. Jeter*, 486 U.S. 456 (1988), as standing for the proposition that the 6 year Statute of Limitations results in an unconstitutional burden on Petitioner to file his claim to illegitimate a child. Close examination of these cases reveals that all involve

claims of illegitimate children for the declaration of paternity and for support. The pronouncements in these cases have little to do with the case at bar. One can understand that 6 years would be an unconstitutional burden on the mother or an illegitimate child to establish a paternity claim against a putative father. We do not have that situation in this case.

Petitioner further cites *Karenina By Vronsky v. Presley*, 526 So.2d 518 (Miss. 1988) as an example of unwed parents developing their own informal and, in many cases, workable custody, visitation and support arrangements. It should be noted that in the *Karenina* case the putative father filed suit as next friend of the child and within 6 years of the birth of the child. Furthermore, the putative father proved that the man the natural mother was married to at the time of conception was in a foreign country and had no access to the mother. These facts have no application to the case at bar.

CONCLUSION

For these reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FLOYD J. LOGAN
(Counsel for Record)
LOGAN & WEATHERLY
2211 24th Avenue
Post Office Box 1508
Gulfport, Mississippi 39502

(601) 864-3666

FRANK P. WITTMANN, III
1820 22nd Avenue
Post Office Box 1648
Gulfport, Mississippi 39502

(601) 864-1600

Counsel for Respondents

December 17, 1990